

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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IN RE: WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION

MDL 1566
2:03-CV-01431-PMP-PAL
BASE FILE

HEARTLAND REGIONAL MEDICAL
CENTER, et al.,

2:07-CV-00987-PMP-PAL

Plaintiffs,

v.

ORDER RE: DEFENDANT'S MOTION
TO DISMISS (Doc. #1299)

ONEOK, INC., et al.,

Defendants.

Presently before this Court is Defendant Duke Energy Carolinas, LLC's Motion to Dismiss Plaintiffs' Amended Complaint for Damages for Lack of Personal Jurisdiction (Doc. #1299).¹ Plaintiffs filed an Opposition (Doc. #1458) and supporting exhibits (Doc. #1459, #1471). Defendant filed a Reply (Doc. #1487).

I. BACKGROUND

A. Procedural Background

This case is one of many in consolidated Multidistrict Litigation arising out of the energy crisis of 2000-2001. Plaintiffs originally filed the above action in the Circuit Court of Buchanan County, Missouri. (Notice of Removal, Compl. [2:07-CV-00987-PMP-PAL, Doc. #1].) Defendants removed the case to the United States District Court for the Western District of Missouri. (*Id.*) The Judicial Panel on Multidistrict Litigation entered a Transfer

¹ Document numbers refer to the base file, 2:03-CV-01431-PMP-PAL, unless otherwise noted.

1 Order pursuant to 28 U.S.C. § 1407 centralizing the foregoing action in this Court for
2 coordinated or consolidated pretrial proceedings. (Conditional Transfer Order [2:06-CV-
3 1351-PMP-PAL, Doc. #8].)

4 In this litigation, Plaintiffs seek to recover damages on behalf of natural gas rate
5 payers. In the Complaint, Plaintiffs allege Defendants engaged in anti-competitive
6 activities with the intent to manipulate and artificially increase or control the price of
7 natural gas for consumers. (Am. Compl. (Doc. #1260) at 28-37.) Specifically, Plaintiffs
8 allege Defendants knowingly delivered false reports concerning trade information and
9 engaged in wash trades, in violation of Missouri Antitrust Law, R.S. Mo. § 416.010, et seq.
10 (Id.)

11 Plaintiffs Heartland Regional Medical Center and Prime Tanning Corp. are
12 Missouri non-profit companies with their principal places of business in Missouri. (Id. at
13 3.) Plaintiffs allege they purchased natural gas directly from one or more Defendants, and
14 from other natural gas sellers in the State of Missouri, during the past six years. (Id.)
15 According to the Complaint, Defendants are natural gas companies that buy, sell, transport,
16 and store natural gas, including their own and their affiliates' production, in the United
17 States and in the State of Missouri. (Id. at 3-27.)

18 The Amended Complaint's allegations are directed generally at two types of
19 Defendants: the natural gas companies that actually engaged in natural gas sales and the
20 related reporting of allegedly manipulated gas prices to the trade indices, and those
21 companies' parent corporations. The Amended Complaint does not allege the parent
22 company Defendants themselves engaged in natural gas trading and price reporting.
23 Rather, the Amended Complaint alleges these Defendants are the parent companies of
24 subsidiaries which engage in such activity generally, and which also made natural gas sales
25 in Missouri during the relevant time period.

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1 Plaintiffs seek to establish personal jurisdiction over the parent company
2 Defendants based on their out-of-forum activities directed at Missouri along with their
3 subsidiaries' and affiliates' contacts within Missouri. According to the Amended
4 Complaint, the parent company Defendants dominated and controlled their respective
5 subsidiaries and the parent company Defendants "entered into a combination and
6 conspiracy . . . which tended to prevent full and free competition in the trading and sale of
7 natural gas, or which tended to advance or control the market prices of natural gas." (Id. at
8 3, 6, 10, 12, 14, 16, 18, 22, 24-25.) Plaintiffs allege the parent company Defendants
9 intended their actions to have a direct, substantial, and foreseeable effect on commerce in
10 the State of Missouri. (Id. at 4, 6, 10, 12, 14-16, 18, 22, 24-25.) According to the Amended
11 Complaint, the parent company Defendants "made strategic marketing policies and
12 decisions concerning natural gas and the reporting of natural gas trade information to
13 reporting firms for use in the calculation of natural gas price indices that affected the market
14 prices of natural gas, and those policies and decisions were implemented on an operational
15 level by affiliates . . . in the United States and in Missouri." (Id. at 4, 7, 10-11, 13, 15-16,
16 19, 22, 24-26.)

17 Defendant Duke Energy Carolinas, LLC ("DEC") now moves to dismiss, arguing
18 this Court lacks personal jurisdiction over it. According to DEC, it conducts no business in
19 Missouri and has no other contacts supporting general or specific jurisdiction. DEC also
20 argues it cannot be subject to jurisdiction in Missouri based on its subsidiary's contacts with
21 the forum because its subsidiary is not its agent or alter ego. DEC thus argues exercising
22 personal jurisdiction in this case would violate constitutional due process requirements.

23 Plaintiffs respond that DEC's subsidiary has submitted to jurisdiction in Missouri
24 and DEC is subject to personal jurisdiction through agency and alter ego principles based
25 on its subsidiary's contacts with the forum. Additionally, Plaintiffs request the Court to
26 delay ruling on the jurisdictional question until merits discovery is completed because the

1 jurisdictional questions are intertwined with the merits.

2 **B. Facts Related to Personal Jurisdiction**

3 DEC is a North Carolina limited liability company formerly known as Duke
4 Energy Corporation, a North Carolina corporation. (Renewed Mot. to Dismiss for Lack of
5 Pers. Juris. (Doc. #872) ["DEC Mot."], Ex. A at 2.) Duke Energy Corporation converted to
6 a limited liability company and renamed itself DEC in April 2006. (Id.) DEC primarily
7 engages in the business of generating, transmitting, distributing, and selling electric energy
8 in North and South Carolina. (Id. at 3.)

9 DEC does not maintain offices, conduct business, have employees, own property,
10 pay taxes, or maintain a bank account in Missouri. (Mot. to Dismiss for Lack of Pers. Juris.
11 (Doc. #1299) ["DEC Heartland Mot."], Ex. A at 1, Ex. B at 2.) DEC has not purchased,
12 sold, or transported natural gas in Missouri. (DEC Heartland Mot., Ex. C at 2.) DEC has
13 not applied for or received a certificate of authority to transact business in Missouri and has
14 no registered agent for service of process in Missouri. (DEC Heartland Mot., Ex. E at 2.)

15 DEC wholly owns Duke Capital Corporation, which in turn wholly owns Pan
16 Energy Corp. (App. to Pls.' Joint Opp'n to Duke Energy Carolinas, LLC's Mot. to Dismiss
17 for Lack of Pers. Juris. (Doc. #1084) ["Pls.' App."], Ex. F.) Pan Energy Corp. wholly owns
18 Duke Energy Services, Inc., which wholly owns Duke Energy Natural Gas Corporation.
19 (Id.) Duke Energy Natural Gas Corporation wholly owns DETMI Management, Inc. (Id.)
20 DETMI Management, Inc. owns a sixty percent interest in Duke Energy Trade and
21 Marketing, LLC ("DETM"), a Defendant in this action and the subsidiary whose contacts
22 with Missouri Plaintiffs seek to attribute to DEC. (DEC Mot., Ex. C at 2.) Mobil Natural
23 Gas, Inc. ("MNGI"), an indirect subsidiary of Exxon Mobil Corporation, owns the other
24 forty percent of DETM. (Id. at 2-3.)

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1 DETM was created in 1996 as a Delaware limited liability company pursuant to a
2 limited liability company agreement and limited partnership agreement. (Pls.' App., Ex. E
3 at 34-35; App. of Docs. Filed Under Seal (Doc. #1125) ["Sealed App."], Ex. L at
4 DEMDL000383; Separate Vol. of Evid. in Supp. of the Separate App. of Facts Regarding
5 Duke Energy Carolinas, LCC (Doc. #968) ["Separate Vol. Evid."], Ex. 7.) The company
6 now known as DETM originally was called PanEnergy Trading and Marketing Services,
7 LLC, and was created by an agreement between PTMSI Management, Inc. and MNGI.
8 (Separate Vol. Evid., Ex. 7 at 1, 6, 7, 10.) PTMSI Management, Inc.'s parent company at
9 the time was PanEnergy Corp. (Id. at 7, 10.) PanEnergy Corp. was acquired by Duke
10 Energy Corporation in 1997 and PanEnergy Trading and Marketing Services, LLC was
11 renamed to DETM. (Separate Vol. Evid., Ex. 9 at 2.) DETM is engaged in the purchase
12 and sale of natural gas and electricity at wholesale. (DEC Mot., Ex. C at 3.) DETM
13 concedes personal jurisdiction in this action. (App. to Pls.' Opp'n to Duke Energy
14 Carolinas, LLC's Mot. to Dismiss for Lack of Pers. Juris (Doc. #1459) ["Heartland App."],
15 Ex. A at 2.)

16 DETM is run by a Management Committee consisting of three representatives
17 from the Duke Energy side and two representatives from the Exxon Mobil side. (Sealed
18 App., Ex. L at DEMDL000400.) The Management Committee acts through the delegation
19 of certain responsibilities and authority to the managing member, which in 2001 and 2002
20 was DETMI Management, Inc. (Id.) Although DETMI Management, Inc. was the
21 managing member, and through its majority status on the committee could outvote the
22 MNGI members on certain matters, the limited liability company agreement mandated that
23 some actions required unanimous approval by the Management Committee. (Separate Vol.
24 Evid., Ex. 7 at 17, 24, 26-27.) In at least one instance, the MNGI members refused to agree
25 to a business plan supported by the DETMI Management, Inc. members. (Pls.' App., Ex. E
26 at 67-69.)

1 No DEC director serves as an officer or director for DETM. (DEC Mot., Ex. A
2 at 4.) During the 2000 to 2002 time frame, only one DEC officer also served as a DETM
3 officer, and that person did so only for approximately three months. (DEC Heartland Mot.,
4 Ex. E at 3.) In DEC's 2000 annual report, DEC identified a "management team" which
5 includes Jim W. Mogg ("Mogg"), Chief Executive Officer of Duke Energy Field Services;
6 Kirk B. Michael ("Michael"), Vice President and Chief Financial Officer for Finance and
7 Planning; James Donnell ("Donnell"), President and Chief Executive Officer for Duke
8 Energy North America; and Ronald Green ("Green"), President and Chief Executive
9 Officer for Duke/Fluor Daniel. (Pls.' App., Ex. B at DEMDL001901.) Mogg, Michael,
10 Donnell, and Green were members of the DETM Management Committee at one point or
11 another. (Sealed App., Ex. L at DEMDL001702, DEMDL001706, DEMDL001711.)

12 DEC and DETM maintain separate corporate records. (DEC Mot., Ex. A at 4.)
13 DEC provided corporate services to DETM, including administering employee health
14 insurance, human resources, computer technology, legal services, and credit risk
15 management. (Pls.' App., Ex. A at 4-5.) Throughout the relevant time period, DETM
16 regularly used, and was permitted to use, the "Duke Energy" and "Mobil" logos. (Id. at 5.)
17 DETM did not have any agency agreements or power of attorney for DEC, and did not
18 register to do business on DEC's behalf in Missouri during the relevant time period.
19 (Heartland App., Ex. A at 6.)

20 DETM was financed through a \$150 million funding facility, of which DETMI
21 Management, Inc. provided sixty percent and MNGI funded the other forty percent.
22 (Separate Vol. Evid., Ex. 3 at 35.) In DETM's financial statements, it twice indicated that
23 DEC was responsible for providing operational interest-free contributions, on a
24 proportionate basis with Exxon Mobil, to fund DETM's operations. (Sealed App., Ex. L at
25 DEMDL00383, DEMDL00400.) According to Richard McGee ("McGee"), former general
26 counsel for energy services for DEC and current president of DEC's international business,

1 these statements were a mistake, as PanEnergy Corp., not DEC, is responsible for making
2 contributions under the funding facility agreement. (Pls.' App., Ex. E at 6, 138-40.) DEC's
3 consolidated financial reports reflected sixty percent of DETM's profits and losses during
4 the relevant time period. (Pls.' App., Ex A at 6.)

5 DEC describes itself, collectively with its subsidiaries, as "an integrated energy
6 and energy services provider with the ability to offer physical delivery and management of
7 both electricity and natural gas throughout the U.S. and abroad." (Pls.' App., Ex. B at
8 DEMDL001846.) DEC provides these services through various "business segments," one
9 of which includes DETM's natural gas trading. (Id.) DEC describes its business strategy as
10 "develop[ing] integrated energy businesses in targeted regions where Duke Energy's
11 extensive capabilities in developing energy assets, operating electricity, natural gas and
12 NGL plants, optimizing commercial operations and managing risk can provide
13 comprehensive energy solutions for customers and create superior value for shareholders."
14 (Id.)

15 DEC has created "[c]omprehensive risk management polices" to monitor and
16 manage market, commodity price, credit, and other risks to which DEC and its subsidiaries
17 are exposed. (Id. at DEMDL001854-55.) As part of its risk management policies, DEC
18 monitors certain metrics, such as value-at risk ("VAR") and daily earnings at risk ("DER")
19 on a daily basis. (Id. at DEMDL001855.) DEC has several committees which perform risk
20 management, including the Corporate Risk Management Committee, the Energy Risk
21 Management Committee, and the Financial Risk Management Committee. (Pls.' App., Ex.
22 E at 80.) DEC appointed the members of each of these committees. (Id.) Through these
23 polices and committees, DEC sets overall risk guidelines for its subsidiaries.

24 For example, DEC adopted a Code of Business Ethics which applied to every
25 DEC subsidiary. (Pls.' App., Ex. J, Ex. E at 100-01.) This policy mandated compliance
26 with applicable antitrust laws. (Pls.' App., Ex. J at 12.) This policy was implemented and

1 supervised by DEC's Corporate Compliance Committee. (Id. at 15.) The Corporate
2 Compliance Committee was responsible for updating the code, establishing education
3 programs for employees about ethics and compliance issues, providing guidance under the
4 code, monitoring and auditing compliance, reporting periodically to management and the
5 Audit Committee of DEC's Board of Directors, and reporting violations to the appropriate
6 governmental authorities. (Id.) DETM either incorporated this policy by reference or
7 adopted a similar policy. (Pls.' App., Ex. E at 115-16.)

8 DEC also has a Corporate Credit Risk policy. (Sealed App., Ex. L at
9 DEMDL001382, DEMDL001388.) Under this policy, DEC's Chief Risk Officer chairs the
10 Risk Management Committee. (Id.) The Risk Management Committee meets at least
11 monthly and is responsible for reviewing business trends and credit exposure, monitoring
12 compliance with the policy, identifying where new policies are needed, and ensuring
13 "consistent and mutually reinforcing credit and market risk management strategies through
14 various corporate risk policies and associated guidelines for implementing policy." (Id.)
15 The policy also sets forth the duties of the Chief Credit Officer, which includes the ability
16 to "stop business activity that would increase credit exposure, as is necessary, to protect
17 Duke Energy's balance sheet." (Id.) The Chief Credit Officer reports to the Chief Risk
18 Officer. (Id.)

19 DEC has a Corporate Risk Management Committee consisting of DEC's chief
20 financial officer and DEC Policy Committee members. (Id. at DEMDL001488.) This
21 Committee establishes "comprehensive risk management policies to monitor and control
22 identified risks." (Id.) DEC's Corporate Risk Management Committee delegates some
23 responsibilities to the Energy Risk Management Committee and the Financial Risk
24 Management Committee, but retains oversight responsibilities. (Id.) The Energy Risk
25 Management Committee has responsibility for overseeing energy risk management
26 practices and recommending energy commodity exposure limits, subject to approval by the

1 Corporate Risk Management Committee. (Id.) The Financial Risk Management
2 Committee is responsible for managing risks related to interest rates, foreign currency, and
3 credit. (Id.)

4 Within DETM, “[u]ltimate risk control responsibility resides with the DETM
5 Management Committee.” (Id. at DEMDL001489.) The DETM Management Committee
6 oversees the risk management and control function and approves policies and controls for
7 DETM. For example, DETM adopted its own Risk Management and Trading Policies and
8 Controls. (Id. at DEMDL001484.) DETM’s Management Committee “delegates the day-
9 to-day overview of the risk management and control function” to the DEC Energy Risk
10 Management Committee. (Id. at DEMDL001489.) “However, overall responsibility for
11 DETM’s performance targets, business plans and approved risk levels remains with the
12 Management Committee.” (Id.) Although DETM’s Risk Management and Trading
13 Policies and Controls states that the Management Committee delegates “day-to-day
14 overview” to the DEC Energy Risk Management Committee, it describes the Energy Risk
15 Management Committee’s functions as meeting “at least monthly” to establish risk
16 management policies, controls, and practices, and overseeing and approving excesses of
17 overall limits. (Id. at DEMDL001489-90.) When it comes to operational control, the policy
18 vests that authority in DETM Senior Management. (Id. at DEMDL001490.) DETM Senior
19 Management is responsible for “[d]evelopment of trading strategies; [a]ctive management
20 of trading within overall limits; [a]llocation of limits to traders and/or books; [e]nforcing
21 the risk control environment; [a]dvocating new limits and products; and [a]dvocating
22 exceptions or revisions to policy when appropriate.” (Id.) Beneath DETM Senior
23 Management, the origination and trading groups actually conduct the transactions with
24 customers. (Id.)

25 DEC’s Energy Risk Management Committee is not responsible for managing
26 energy price risk for DETM. (Separate Vol. Evid., Ex. 10 at DEMDL001569.) Instead,

1 DETM manages its own energy price risk pursuant to its own risk management policy. (Id.)
2 However, that policy is subject to approval by the Corporate Risk Management Committee.
3 (Id.) In similar fashion, DETM decides whether to extend credit, subject to the Financial
4 Risk Committee's Credit Quality Guidelines. (Id. at DEMDL001495.) According to
5 McGee, DEC's risk management policies "would have applied to DETM only to the extent
6 that . . . the management committee of DETM had adopted a policy that was similar to this
7 or [DETM], in discharging its responsibilities as a managing member of DETM . . .
8 adopt[ed] policies that it saw fit in connection with discharging those duties." (Pls.' App.,
9 Ex. E at 100.) These policies "were either largely consistent with or in some cases maybe
10 identical to some of" DEC's policies. (Id.)

11 At a July 2000 DETM management committee meeting, the MNGI representative
12 expressed some concern that certain personnel now working for DETM would be shared
13 between DETM and Duke Energy North America, LLC. (Sealed App., Ex. L at
14 DEMDL001707.) Specifically, the MNGI representative was concerned that because
15 DETM senior managers "would have dual responsibilities, working for both DETM and
16 Duke Energy or Duke affiliates, [they] would face conflicts because their compensation is
17 based on performance of two entities with differing Duke ownership shares." (Id.) At a
18 September 2001 DETM management committee meeting, the Exxon Mobil representative
19 "objected to the way the business had been run including a perceived lack of separation
20 between [Duke Energy North America] and DETM." (Id. at DEMDL001718.)

21 In May 2002, DETM's outside auditor, Deloitte & Touche, sent a letter to the
22 DETM management committee highlighting certain areas of concern. (Id. at
23 DEMDL002687.) Among the concerns Deloitte & Touche highlighted was that DETM's
24 operations were "highly integrated into the overall strategy of Duke Energy North America
25 ('DENA'). There are instances where the distinctiveness between DETM and other

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1 affiliates of its owners could be enhanced.”² (Id. at DEMDL002692.)

2 In September 2003, the Commodity Futures Trading Commission (“CFTC”)
3 entered into a settlement with DETM regarding allegations that DETM manipulated the
4 natural gas market. (DEC Heartland Mot., Ex. G.) The CFTC found that from January
5 2000 through August 2002, DETM’s Houston office reported to price reporting firms false
6 price and volume information regarding natural gas transactions. (Id. at 2-3.) As part of the
7 settlement, DETM agreed to cease and desist from any future violations, and agreed to pay
8 a \$28 million fine. (Id. at 5.) Additionally, both DETM and Duke Energy Corporation
9 (DEC’s predecessor) agreed to cooperate in any future investigations arising out of this
10 investigation, to preserve records, to produce documents when requested, and to provide
11 assistance in locating and contacting any prior employees. (Id.) DETM and Duke Energy
12 Corporation also agreed not to publicly deny the CFTC’s findings of fact. (Id. at 6.) DEC
13 attorneys and senior executives participated in internal investigations into DETM’s price
14 reporting activities. (Pls.’ App., Ex. A at 6.)

15 In April 2003, DEC announced that two of its subsidiaries, Duke Energy North
16 America and Duke Energy Merchants, would cease proprietary trading of natural gas and
17 power. (DEC Mot., Ex. G.) DETM also ceased speculative natural gas trading in 2003.
18 (Pls.’ App., Ex. A at 5.) After that time, DETM continued to buy and sell natural gas “for
19 the purpose of meeting and hedging its obligations to supply gas-fired power plants owned
20 by Duke Energy North America, Inc. and other affiliates and to meet natural gas supply
21 commitments it has made.” (Id.) By the end of 2004, DEC “made substantial progress on
22 winding down” the DETM joint venture with Exxon Mobil, and had “completed or signed
23 transactions to sell about 90 percent of that business.” (Pls.’ App., Ex. G.)

24
25 ² DEC objects to the admission of the Deloitte & Touche letter as inadmissible hearsay.
26 Because consideration of the letter does not affect the outcome of this decision, the Court will deny
DEC’s objection.

1 The parties now dispute the significance of these contacts under the Missouri
2 long-arm statute. The parties also dispute whether this Court’s exercise of personal
3 jurisdiction over DEC would violate constitutional due process requirements.

4 **II. PERSONAL JURISDICTION**

5 “When a defendant moves to dismiss for lack of personal jurisdiction, the
6 plaintiff bears the burden of demonstrating that the court has jurisdiction over the
7 defendant.” Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). To meet this
8 burden, a plaintiff must demonstrate that personal jurisdiction over a defendant is (1)
9 permitted under the applicable state’s long-arm statute and (2) that the exercise of
10 jurisdiction does not violate federal due process. Id. The Court must analyze whether
11 personal jurisdiction exists over each defendant separately. Harris Rutsky & Co. Ins.
12 Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1130 (9th Cir. 2003).

13 Where the issue is before the Court on a motion to dismiss based on affidavits
14 and discovery materials without an evidentiary hearing, the plaintiff must make “a prima
15 facie showing of facts supporting jurisdiction through its pleadings and affidavits to avoid
16 dismissal.” Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114,
17 1119 (9th Cir. 2002). The Court accepts as true any uncontroverted allegations in the
18 complaint and resolves any conflicts between the facts contained in the parties’ evidence in
19 the plaintiff’s favor. Id. However, for personal jurisdiction purposes, a court “may not
20 assume the truth of allegations in a pleading which are contradicted by affidavit.”
21 Alexander v. Circus Circus Enters., Inc., 972 F.2d 261, 262 (9th Cir. 1992) (quotation
22 omitted).

23 In diversity cases such as this, “a federal court applies the personal jurisdiction
24 rules of the forum state provided the exercise of jurisdiction comports with due process.”
25 Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). However, “federal law is controlling
26 on the issue of due process under the United States Constitution.” Data Disc, Inc. v. Sys.

1 Tech. Assoc., Inc., 557 F.2d 1280, 1286 n.3 (9th Cir. 1977); see also Dole Food Co., Inc. v.
2 Watts, 303 F.3d 1104, 1110 (9th Cir. 2002). Therefore, the Court will apply law from the
3 United States Court of Appeals for the Ninth Circuit in deciding whether jurisdiction is
4 appropriate under the Due Process Clause. See In re Korean Air Lines Disaster of Sept. 1,
5 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (concluding that “the transferee court [should]
6 be free to decide a federal claim in the manner it views as correct without deferring to the
7 interpretation of the transferor circuit”); Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir.
8 1993) (holding that “a transferee federal court should apply its interpretations of federal
9 law, not the constructions of federal law of the transferor circuit”).

10 To satisfy federal due process standards, a nonresident defendant must have
11 “minimum contacts” with the forum state so that the assertion of jurisdiction does not
12 offend traditional notions of fair play and substantial justice. Pebble Beach Co., 453 F.3d at
13 1155 (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 315 (1945)). A federal district
14 court may exercise either general or specific personal jurisdiction. See Helicopteros
15 Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 (1984).

16 To establish general personal jurisdiction, the plaintiff must demonstrate the
17 defendant has sufficient contacts to “constitute the kind of continuous and systematic
18 general business contacts that ‘approximate physical presence.’” Glencore Grain, 284 F.3d
19 at 1124 (quoting Bancroft & Masters, Inc. v. Augusta Nat’l Inc., 223 F.3d 1082, 1086 (9th
20 Cir. 2000), modified, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, 433
21 F.3d 1199, 1207 (9th Cir. 2006)). Courts consider such factors as whether the defendant
22 makes sales, solicits or engages in business in the state, serves the state’s markets,
23 designates an agent for service of process, holds a license, or is incorporated there.
24 Bancroft, 223 F.3d at 1086. “[A] defendant whose contacts are substantial, continuous, and
25 systematic is subject to a court’s general jurisdiction even if the suit concerns matters not
26 arising out of his contacts with the forum.” Glencore Grain, 284 F.3d at 1123 (citing

1 Helicopteros, 466 U.S. at 415 n.9).

2 A nonresident defendant's contacts with the forum state may permit the exercise
3 of specific jurisdiction if: (1) the defendant has performed some act or transaction within
4 the forum or purposefully availed himself of the privileges of conducting activities within
5 the forum, (2) the plaintiff's claim arises out of or results from the defendant's forum-
6 related activities, and (3) the exercise of jurisdiction over the defendant is reasonable.
7 Pebble Beach Co., 453 F.3d at 1155-56. "If any of the three requirements is not satisfied,
8 jurisdiction in the forum would deprive the defendant of due process of law." Omeluk v.
9 Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995).

10 Under the first prong of the "minimum contacts test," the plaintiff must establish
11 either that the defendant "(1) purposefully availed himself of the privilege of conducting his
12 activities in the forum, or (2) purposefully directed his activities toward the forum." Pebble
13 Beach Co., 453 F.3d at 1155. "Evidence of availment is typically action taking place in the
14 forum that invokes the benefits and protections of the laws in the forum." Id. Evidence of
15 direction usually consists of conduct taking place outside the forum that the defendant
16 directs at the forum. Id. at 1155-56.

17 The purposeful direction aspect of the first prong is satisfied when a foreign act is
18 both aimed at and has effect in the forum. Id. In other words, the defendant "must have (1)
19 committed an intentional act, which was (2) expressly aimed at the forum state, and (3)
20 caused harm, the brunt of which is suffered and which the defendant knows is likely to be
21 suffered in the forum state." Id. To satisfy the third element of this test, the plaintiff must
22 establish the defendant's conduct was "expressly aimed" at the forum; a "mere foreseeable
23 effect" in the forum state is insufficient. Id. The "express aiming" requirement is satisfied
24 when the defendant is alleged to have engaged in wrongful conduct "individually targeting
25 a known forum resident." Bancroft, 223 F.3d at 1087.

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1 The second prong of the specific jurisdiction test requiring that the contacts
 2 constituting purposeful availment or purposeful direction give rise to the current action is
 3 measured in terms of “but for” causation. Id. at 1088. “If the plaintiff establishes both
 4 prongs one and two, the defendant must come forward with a ‘compelling case’ that the
 5 exercise of jurisdiction would not be reasonable.” Boschetto v. Hansing, 539 F.3d 1011,
 6 1016 (9th Cir. 2008) (quotation omitted).

7 Plaintiffs are not contending this Court may assert personal jurisdiction over
 8 DEC based on REI’s own contacts with Missouri. (Pls.’ Opp’n to Duke Energy Carolinas,
 9 LLC’s Mot. to Dismiss for Lack of Pers. Juris. (Doc. #1458) at 3.) Consequently, DEC is
 10 subject to personal jurisdiction in Missouri only if the forum acts of its subsidiary, DETM,
 11 are attributable to it through alter ego or agency principles.³

12 **A. Alter Ego**

13 A “parent-subsidary relationship alone is insufficient to attribute the contacts of
 14 the subsidiary to the parent for jurisdictional purposes.” Harris Rutsky & Co. Ins. Servs.,
 15 Inc., 328 F.3d at 1134. However, a subsidiary’s contacts may be imputed to its parent for
 16 personal jurisdiction purposes where the subsidiary is the parent’s alter ego. Id.

17 To demonstrate a parent and its subsidiary are alter egos, the plaintiff must
 18 establish a prima facie case that the two companies share “such unity of interest and
 19 ownership” that the companies’ separateness no longer exists and “failure to disregard
 20 [their separate identities] would result in fraud or injustice.” Doe v. Unocal Corp., 248 F.3d
 21 915, 926 (9th Cir. 2001) (quotation omitted). To demonstrate a unity of interest warranting
 22 disregard of corporate separateness, the plaintiff must show the parent controls its
 23 subsidiary to such a degree as to render the subsidiary a “mere instrumentality” of its parent.
 24 Id. (quotation omitted). Typically, this would involve showing the parent controls the

25 ³ The Court will assume that if DETM’s forum-related acts are attributable to DEC, the
 26 Missouri long-arm statute is satisfied.

1 subsidiary's internal affairs or daily operations. Kramer Motors, Inc. v. British Leyland,
 2 Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980).⁴

3 A parent corporation may be involved directly in certain aspects of its wholly
 4 owned subsidiary's affairs without subjecting itself to alter ego status. For example, a
 5 parent may provide financing to its subsidiary so long as it maintains corporate formalities
 6 and properly documents loans and capital contributions to its subsidiaries, and it may act as
 7 its subsidiary's guarantor. Doe, 248 F.3d at 927-28. Additionally, a parent may refer to its
 8 subsidiaries as divisions of the parent in annual reports. Id. at 928. Further, a parent may
 9 review and approve major decisions, place its own directors on the subsidiary's board, and
 10 share offices and staff with its wholly owned subsidiary without being considered its alter
 11 ego. Id.; Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1135.

12 In sum, a parent may involve itself directly in its subsidiary's activities without
 13 becoming an alter ego "so long as that involvement is consistent with the parent's investor
 14 status." Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1135 (quotation omitted).

15 Activities consistent with investor status include "monitoring of the subsidiary's
 16 performance, supervision of the subsidiary's finance and capital budget decisions, and

17 ⁴ Missouri employs a similar alter ego test. Under Missouri law, "when a corporation is so
 18 dominated by a person as to be a mere instrument of that person and is indistinct from the person
 19 controlling it, then the court will disregard the corporate form if to retain it would result in injustice." East Attucks Cmty. Housing, Inc. v. Old Republic Sur. Co., 114 S.W.3d 311, 321-22 (Mo. Ct. App. 2003) (quotation omitted). The party seeking to pierce the corporate veil must show such "complete domination" that "the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." Real Estate Investors Four, Inc. v. Am. Design Group Inc., 46 S.W.3d 51, 56 (Mo. Ct. App. 2001) (quotation omitted). Additionally, the party seeking to pierce must show the corporation used such control to commit a fraud or wrong, to violate statutory or other positive legal duties, or to perpetrate a dishonest and unjust act in contravention of plaintiff's legal rights. Id. Finally, the party must show "[t]he control and breach of duty" proximately caused the injury. Id. (quotation omitted). To the extent Missouri would look to the law of the state of incorporation to determine alter ego status, see In re Bridge Info. Sys., Inc., 325 B.R. 824, 830-31 (Bankr. E.D. Mo. 2005), North Carolina has similar requirements. See State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 666 S.E.2d 107, 112-15 (N.C. 2008); East Market Street Square, Inc. v. Tycorp Pizza IV, Inc., 625 S.E.2d 191, 196-201 (N.C. Ct. App. 2006).

1 articulation of general policies and procedures[.]” Doe, 248 F.3d at 926 (quoting United
2 States v. Bestfoods, 524 U.S. 61, 72 (1998)).

3 In addition to showing lack of corporate separateness, the plaintiff also must
4 show that failure to disregard the corporate form would promote fraud or injustice. The
5 fraud or injustice must relate to the forming of the corporation or abuse of the corporate
6 form, not a fraud or injustice generally. Laborers Clean-Up Contract Admin. Trust Fund v.
7 Uriarte Clean-Up Serv., Inc., 736 F.2d 516, 524-25 n.12 (9th Cir. 1984). For example,
8 undercapitalization at the subsidiary’s inception may be evidence of the parent’s fraudulent
9 intent. Id. However, a corporation that once was capitalized adequately but “subsequently
10 fell upon bad financial times” does not support a finding of fraud or injustice. Id. at 525.
11 Further, evidence that the corporation existed as an ongoing enterprise engaged in
12 legitimate business suggests no fraudulent intent or injustice to support piercing the
13 corporate veil. Seymour v. Hull & Moreland Eng’g, 605 F.2d 1105, 1113 (9th Cir. 1979).
14 An inability to collect on a judgment “does not, by itself, constitute an inequitable result.”
15 Id.

16 Plaintiffs have failed to establish a prima facie case of personal jurisdiction based
17 on DETM being DEC’s alter ego. DEC indirectly owns only sixty percent of DETM.
18 DETM thus is neither DEC’s direct subsidiary nor its wholly owned subsidiary. The
19 companies did not share offices and had virtually no overlapping officers or directors. That
20 other officers and directors of other DEC subsidiaries may have overlapped or that DEC
21 identified certain DETM Management Committee members as part of an overall
22 “management team” does not indicate a lack of separateness between DEC and DETM.
23 Likewise, the fact that MNGI and/or Deloitte & Touche perceived a possible lack of
24 separateness between DETM and Duke Energy North America does not establish a lack of
25 separateness between DETM and DEC. Nor does the possibility that DEC was responsible
26 for making contributions under the funding facility or that DEC provided corporate

1 services, such as legal or human resources support.

2 Plaintiffs have presented no evidence that DEC controlled DETM's daily
3 operations. Under the limited liability company agreement, DETMI Management, Inc. was
4 the managing agent, not DEC. And as to DETMI Management, Inc., it did not have
5 complete control over DETM as the MNGI representatives' approval was required for any
6 material decisions. In at least one instance, DETMI Management, Inc. was unable to
7 implement the business plan it desired because it could not obtain the approval of the
8 MNGI representatives on the Management Committee.

9 DEC's promulgation of general policies for its subsidiaries is consistent with its
10 indirect investor status. DEC, as an investor up the corporate chain, is entitled to monitor
11 DETM's performance. Consequently, any daily reporting of information from DETM to
12 DEC is in accord with DEC's investor oversight role. No evidence suggests DEC gave
13 daily control commands to DETM or even to DETMI Management, Inc. Rather, the record
14 demonstrates that, consistent with its investor status, DEC set general policies and
15 guidelines regarding best policies and practices, as well as certain overall limits, such as
16 limits on credit risk. However, DEC's broad policies applied to DETM only to the extent
17 DETM's Management Committee adopted those policies, in whole or in part, through
18 DETMI Management, Inc.'s status as a majority member.

19 Moreover, DETM's delegation of certain risk management oversight to DEC's
20 Energy Risk Management Committee does not demonstrate daily control. The Energy Risk
21 Management Committee meets "at least monthly," and is responsible for establishing risk
22 managing practices and controls, monitoring daily reports, and overseeing and approving
23 any excesses of a risk limit. (Sealed App., Ex. L at DEMDL001490.) The Energy Risk
24 Management Committee thus established broad guidelines under which DETM operated
25 and became involved, if ever, only when overall limits were exceeded. Actual operational
26 decisions, such as developing trading strategy, actively managing trading within overall

1 limits, allocating limits among traders, and enforcing risk control, were the responsibility of
2 DETM Senior Management.

3 Further, with respect to DETM's day-to-day conduct of its business within these
4 guidelines, Plaintiffs present no evidence DEC had any role. For example, with respect to
5 natural gas trading, while DEC set overall limits on certain metrics, DEC had no role in
6 making the day-to-day decisions of who DETM was to trade with, when, for what amount
7 of natural gas, and at what price. Plaintiffs also present no evidence DEC had any role in
8 DETM's price reporting to indices. Plaintiffs present evidence that DEC policies granted
9 DEC's chief credit officer with veto power over any DETM business activity, but Plaintiffs
10 present no evidence that authority ever was exercised over DETM generally or particularly
11 with respect to any natural gas trades in Missouri or anywhere else.

12 Even if Plaintiffs had established a lack of corporate separateness, Plaintiffs have
13 not established a fraud or injustice would result if the Court failed to pierce the corporate
14 veil. Plaintiffs contend it would be unjust to permit DEC to reap the benefits of DETM's
15 alleged unlawful behavior by enjoying profits from DETM's trading activities while
16 escaping liability for DETM's alleged misconduct. However, the alleged illegal price
17 manipulation cannot itself constitute the fraud or injustice necessary to pierce the corporate
18 veil. Rather, DEC must have had some fraudulent intent at DETM's inception or some later
19 abuse of the corporate form such that failing to treat the entities as one would be
20 inequitable. Plaintiffs present no evidence DETM was undercapitalized at its inception.
21 DEC was not involved in forming DETM and became its indirect parent through DEC's
22 acquisition of DETM's ultimate parent, PanEnergy Corp. Further, the fact that DETM
23 operated as a legitimate business for years suggests a lack of fraudulent intent or
24 perpetration of a fraud through use of the corporate structure on the parent's part.

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1 Plaintiffs' fear that they may not be able to collect on a judgment in this action
2 against DETM does not constitute fraud or injustice to support piercing the corporate veil.
3 The Court therefore finds Plaintiffs have not met their burden of establishing DETM is
4 DEC's alter ego, and the Court will not attribute DETM's contacts with Missouri to DEC
5 for purposes of determining personal jurisdiction based on alter ego principles.

6 **B. Agency**

7 A subsidiary's contacts also may be imputed to its parent for personal jurisdiction
8 purposes where the subsidiary is the parent's general agent in the forum. Harris Rutsky &
9 Co. Ins. Servs., Inc., 328 F.3d at 1134. A subsidiary is its parent's agent for purposes of
10 attributing its forum-related contacts to the parent if the subsidiary "performs services that
11 are 'sufficiently important to the foreign corporation that if it did not have a representative
12 to perform them, the corporation's own officials would undertake to perform substantially
13 similar services.'" Doe, 248 F.3d at 928 (quoting Chan v. Society Expeditions, Inc., 39
14 F.3d 1398, 1405 (9th Cir. 1994)). The ultimate inquiry is whether the subsidiary's presence
15 in the forum "substitutes" for its parent's presence. Id. at 928-29 (quotation omitted).

16 Where the parent is merely a holding company, the subsidiary's forum-related
17 contacts are not done as the parent's agent because the holding company "could simply hold
18 another type of subsidiary" as an investment and thus the subsidiary conducts business not
19 as the parent's agent but as its investment. Id. at 929. "Where, on the other hand, the
20 subsidiaries are created by the parent, for tax or corporate finance purposes, there is no
21 basis for distinguishing between the business of the parent and the business of the
22 subsidiaries." Id. (quotation omitted). The inquiry as to whether a subsidiary is its parent's
23 general agent in the forum is "a pragmatic one." Gallagher v. Mazda Motor of Am., Inc.,
24 781 F. Supp. 1079, 1085 n.10 (E.D. Pa. 1992).

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1 For example, where a Japanese parent company was engaged in the manufacture
2 of watches, its subsidiaries that acted as its sole sales agents in America were “almost by
3 definition . . . doing for their parent what their parent would otherwise have to do on its
4 own.” Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1342
5 (E.D.N.Y. 1981). The Bulova court thus attributed the subsidiaries’ contacts to the parent
6 company. Id.; see also Chan, 39 F.3d at 1405-06 (remanding to the district court for
7 additional findings of fact regarding agency where the German parent corporation owned
8 and operated cruise ships and its local subsidiary marketed cruises and chartered cruise
9 ships and sold the cruise ticket to the plaintiffs out of which the claims arose); Modesto City
10 Schs. v. Riso Kagaku Corp., 157 F. Supp. 2d 1128, 1135 (E.D. Cal. 2001) (holding
11 subsidiary was parent’s agent for personal jurisdiction purposes where subsidiary acted as
12 sole conduit for marketing and selling parent’s products in the United States).

13 In contrast, where the parent company owned a subsidiary mining company’s
14 stock but did not itself engage in the business of gold mining, imputing the subsidiary’s
15 forum contacts to the parent was not appropriate. Sonora Diamond Corp. v. Superior Court,
16 99 Cal. Rptr. 2d 824, 840-41 (Ct. App. 2000). As the Sonora Diamond court explained, had
17 the parent company owned “the rights to the gold and used Sonora Mining as the operating
18 and marketing entity,” then perhaps general jurisdiction over the parent company would be
19 appropriate because under those circumstances the parent company “could not reap the
20 benefits of its rights unless it or someone else removed and sold the ore.” Id. But where
21 the parent simply held the mining company as an investment, the subsidiary’s forum-related
22 contacts could not be imputed to the parent company. Id.

23 Likewise, in Doe, the Ninth Circuit concluded a foreign company’s subsidiaries
24 were not its general agents in California because the plaintiffs presented no evidence that in
25 the absence of the California subsidiaries’ involvement in petrochemical and chemical
26 operations, the parent would have conducted and controlled those operations. Doe, 248

1 F.3d at 929. The Court reached this conclusion even though the parent company issued
2 consolidated reporting, referred to a subsidiary in an annual report as its “US unit,” and
3 stated that use of the subsidiary “would enable it to expand its marketing network and
4 produce higher value-added specialty products in the United States.” Id.

5 Plaintiffs have failed to establish a prima facie case that DETM was DEC’s
6 general agent in Missouri. DEC’s primary business is the generation and supply of
7 electricity to end users in North and South Carolina. DEC also acts as a holding company,
8 but it is not purely a holding company in the sense that it does not passively hold stock in
9 companies from an unrelated range of businesses. DEC has described itself as a “an
10 integrated energy and energy services provider with the ability to offer physical delivery
11 and management of both electricity and natural gas throughout the U.S. and abroad.” (Pls.’
12 App., Ex. B at DEMDL001846.)

13 In practice, DEC itself does not perform these activities beyond the generation
14 and transmission of electricity in North and South Carolina, but holds the shares of various
15 subsidiaries which either engage in those activities or which in turn own subsidiaries which
16 perform those business operations. Among these business operations was DEC’s North
17 American Wholesale Energy business segment, which included DETM’s natural gas-related
18 activities. (Id.)

19 Although DEC identifies natural gas trading and marketing as one of its business
20 segments, Plaintiffs have not established that DETM’s sales of natural gas in Missouri were
21 sufficiently important to DEC that if DETM did not make the sales in Missouri, DEC would
22 have done so itself. DEC’s primary business was electricity generation and transmission in
23 North and South Carolina. Natural gas trading activity was a separate, fragmented
24 component of one of DEC’s other business segments operated through an indirect, partially
25 owned subsidiary. Further, the fact that DETM subsequently ceased natural gas trading in
26 2003 suggests that DETM’s trading activities were not sufficiently important to DEC that it

1 would perform the activities itself if DETM did not do so on its behalf.

2 Moreover, Plaintiffs have presented no evidence that DETM's natural gas sales
3 in Missouri in particular were sufficiently important to DEC's business that DEC would
4 have performed the sales in Missouri itself absent its subsidiary's representation in the
5 forum. See Modesto City Schs., 157 F. Supp. 2d at 1135 (noting twenty percent of parent's
6 products were sold through subsidiary which acted as parent's "sole conduit for marketing
7 and selling its products in the United States"); Bulova Watch Co., Inc., 508 F. Supp. at 1344
8 (noting that sixty percent of parent's products were sold as exports and the United States
9 was the parent company's largest export market through its New York subsidiaries' sales in
10 the United States). Consequently, Plaintiffs have not shown that DETM's Missouri natural
11 gas sales played a significant role in DEC's "organizational life" such that it acted as a
12 substitute for DEC in the forum.⁵ Bulova Watch Co., Inc., 508 F. Supp. at 1344. The Court
13 therefore will not attribute DETM's Missouri contacts to DEC for personal jurisdiction
14 purposes based on agency principles.

15 **C. Request for Deferred Decision**

16 Plaintiffs suggest that because the personal jurisdiction question is intertwined
17 with the merits, the Court should defer ruling on the personal jurisdiction issue until after
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19 ⁵ The result would be the same under general Missouri agency law. In Missouri, an agency
20 relationship, whether actual or apparent, exists when "the credible facts, taken as a whole, fairly
21 disclose that a party is acting for or is representing another by the latter's authority." Motorsport Mktg.
22 Inc. v. Wiedmaier, Inc., 195 S.W.3d 492, 498 (Mo. Ct. App. 2006) (quotation omitted). An agent has
23 apparent authority when (1) the principal has manifested his consent to the agent exercising such
24 authority or knowingly permitted the agent to exercise such authority; (2) a third person acting in good
faith, "had reason to believe, and actually believed, the agent possessed such authority;" and (3) the
third person "relying on the appearance of authority changed his position and will be injured or suffer
loss if the transaction executed by the agent does not bind the principal." Id. (quotation omitted).

25 Plaintiffs present no evidence of any manifestation by DEC to DETM that DETM may act on
26 DEC's account. Although Plaintiffs have presented evidence DEC permitted DETM to market natural
gas using the "Duke Energy" name and logo, Plaintiffs have not presented any evidence that any third
party relied on an apparent agency between DEC and DETM.

1 merits discovery is completed. Plaintiffs rely on Data Disc, Inc., 557 F.2d at 1285 n.2.
2 However, Data Disc, Inc. states that where the jurisdictional issues are intertwined with the
3 merits, the Court may require the plaintiff to establish “only . . . a prima facie showing of
4 jurisdictional facts with affidavits and perhaps discovery materials.” Id. As the Court is
5 considering the personal jurisdiction issue on the basis of affidavits and documentary
6 evidence without holding an evidentiary hearing, the Court is following Data Disc, Inc. by
7 holding Plaintiffs to this standard, and is not requiring Plaintiffs to meet the higher burden
8 of demonstrating personal jurisdiction by a preponderance of the evidence, as Plaintiffs
9 would have to do at an evidentiary hearing or at trial. Id.

10 Moreover, Plaintiffs have not convinced the Court that further discovery would
11 produce a different result. DEC provided Plaintiffs with every DEC document which DEC
12 provided to the CFTC in conjunction with the CFTC’s investigation of DETM’s natural gas
13 trading activity in the relevant time period. (Mem. of Defs. Duke Energy Carolinas, LLC &
14 Duke Energy Trading & Marketing, LLC in Opp’n to Pls.’ Mot. to Compel Disc. (Doc.
15 #935) [“Opp’n to Mot. Compel”], Ex. B at 2; Tr. of Proceedings (Doc. #1138) at 55.) The
16 documents provided to the CFTC consisted almost entirely of DETM documents. (Opp’n
17 to Mot. Compel, Ex. B at 2; Tr. of Proceedings at 55.) The only DEC documents consisted
18 of general risk management policies and board of director meeting minutes, which DEC has
19 provided to Plaintiffs. (Opp’n to Mot. Compel, Ex. B at 2; Tr. of Proceedings at 55-56.)
20 The Court therefore will decline Plaintiffs’ request to defer the personal jurisdiction issue to
21 be resolved with the merits.

22 The Court will not attribute DETM’s contacts with the forum to DEC, and DEC
23 has no contacts of its own sufficient to support personal jurisdiction. The Court therefore
24 will grant DEC’s motion to dismiss for lack of personal jurisdiction.


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1 **III. CONCLUSION**

2 IT IS THEREFORE ORDERED that Defendant Duke Energy Carolinas, LLC's
3 Motion to Dismiss Plaintiffs' Amended Complaint for Damages for Lack of Personal
4 Jurisdiction (Doc. #1299) is hereby GRANTED. Defendant Duke Energy Carolinas, LLC
5 is hereby dismissed as a defendant in this action for lack of personal jurisdiction.
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7 DATED: February 23, 2009

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9 PHILIP M. PRO
10 United States District Judge
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